

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2023 Session

FILED

09/27/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. MARIO DESHON MURRAY

Appeal from the Criminal Court for Davidson County
No. 2021-B-807 Cheryl A. Blackburn, Judge

No. M2022-01525-CCA-R3-CD

The defendant, Mario Deshon Murray, pleaded guilty to unlawful possession of a firearm after being convicted of a felony involving violence, and the trial court imposed a sentence of fifteen years' incarceration in the Tennessee Department of Correction. On appeal, the defendant argues the trial court erred in denying his request for alternative sentencing, in misapplying mitigating factors, and in imposing consecutive sentences. After reviewing the record and considering the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Martesha Johnson Moore, Chief Public Defender, Will Allensworth, Assistant Public Defender, for the appellant, Mario Deshon Murray.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and Megan King, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

I. Guilty Plea

On December 14, 2021, the defendant entered an open plea to unlawful possession of a firearm after being convicted of a felony involving violence, with sentencing to be

determined by the trial court.¹ The facts underlying the plea, as explained by the State, were as follows:

[O]n April the 2nd, 2021, in Davidson County, officers were conducting an undercover surveillance operation for the purpose of locating the defendant, who was wanted at the time for criminal homicide. They observed a vehicle leaving a parking lot, identified the defendant as the driver, conducted a traffic stop. The defendant was taken into custody. In the car, two firearms were located. During an interview with the detective, the defendant admitted to ownership of one of them, and he has been previously convicted of at least one felony crime of violence.

II. Sentencing Hearing

During the sentencing hearing, a copy of the defendant's presentence report and juvenile record were introduced as well as a recording of the defendant's interview with the lead detective.

Brandi Jimerson with the Davidson County Community Corrections Program testified that the defendant completed a drug and alcohol assessment during which he reported that he began using alcohol and marijuana daily at the age of fourteen and cocaine at the age of twenty-five. The defendant also admitted to using ecstasy and "ice" on a recreational basis. Although the defendant enrolled in a treatment program while in custody, he reported that he did not attempt to receive help for his drug and alcohol issues prior to his incarceration. As part of the assessment, Ms. Jimerson reviewed the defendant's presentence report, and she agreed that his criminal history corroborated what the defendant told her regarding his drug abuse. If the defendant were sentenced to community corrections, Ms. Jimerson testified that he would need to attend an inpatient treatment program followed by transitional housing.

In sentencing the defendant, the trial court considered the evidence presented during the guilty plea and sentencing hearings, including the presentence report and the arguments of counsel. In reviewing the applicable enhancement factors, the trial court found enhancement factors (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range, and (13) at the time the felony was committed the defendant was released on probation. Tenn. Code Ann. § 40-35-114(1), (13). The trial court also applied mitigating factor (13) based on the defendant's decision to plead guilty. *Id.* § 40-35-113(13). After applying and

¹ The defendant was also indicted for first-degree murder, but that charge was dismissed as part of the plea deal.

weighing the applicable enhancement and mitigating factors and considering the facts and circumstances of the case, the trial court sentenced the defendant as a Range II offender to fifteen years at 35% to be served consecutively to the defendant's prior sentence in Davidson County Case No. 2016-I-990 for which he was on probation at the time he committed the instant offense.

In considering alternative sentencing, the trial court noted the only alternative sentence the defendant was potentially eligible for was community corrections under the special needs provision of the statute, which required the defendant to show that he had a history of chronic alcohol or drug abuse or mental health problems. Ultimately, the trial court determined "under the circumstances of this case that community corrections would [not] be [] appropriate."

Analysis

On appeal, the defendant challenges the trial court's decisions regarding the length and manner of service of his sentence. He contends the trial court erred in denying an alternative sentence, in misapplying mitigating factors, and in imposing consecutive sentences. The State submits the trial court properly denied community corrections and imposed consecutive sentences.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -113, -114, -210(b). In addition, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* § 40-35-103(4).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory presumptive minimum sentence and rendered enhancement factors advisory only. *See* Tenn. Code Ann. §§ 40-35-114, -210(c). Although the application of the factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114." *Id.* § 40-35-210(b)(5). The trial court must also place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." *Id.* § 40-35-210(e).

When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). If a trial court misapplies an enhancing or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709. This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

I. Denial of Alternative Sentencing

The defendant contends the trial court erred in denying alternative sentencing. Although the defendant argues he is eligible for community corrections under the special needs provision of the statute, he also acknowledges that, under prevailing case law, his fifteen-year sentence makes him ineligible for probation and, thus, ineligible for the special needs exception. Therefore, the defendant contends the "court-made requirement that defendants must be eligible for probation in order to receive community corrections under the special needs provision has no statutory basis." *See State v. Staten*, 787 S.W.2d 934, 936-37 (Tenn. Crim. App. 1989). He also asks us to abandon the requirement that a defendant's special need be "reasonably related to and contributed to the offender's criminal conduct." *State v. Boston*, 938 S.W.2d 435, 439 (Tenn. Crim. App. 1996). The State submits the trial court properly denied community corrections pursuant to the special needs provision because the defendant was not eligible for probation.

In *Staten*, this Court held that a defendant must be eligible for probation in order to qualify for a community corrections sentence under Tennessee Code Annotated section 40-36-406(c). 787 S.W.2d at 936-37. We later clarified the findings of facts required before a defendant may be found suitable for placement in community corrections under subsection (c), as follows:

(1) the offender has a history of chronic alcohol, drug abuse, or mental health problems, (2) these factors were reasonably related to and contributed to the offender's criminal conduct, (3) the identifiable special need (or needs) are treatable, and (4) the treatment of the special need could be served best in the community rather than in a correctional institution.

Boston, 938 S.W.2d at 439. It is well-established that “the published opinions of the intermediate appellate courts are opinions which have precedential value and may be relied upon by the bench and bar of this state as representing the present state of law with the same confidence and reliability as the published opinions of [our supreme court], so long as either are not overruled or modified by subsequent decisions.” *Meadows v. State*, 849 S.W.2d 748, 752 (Tenn. 1993).

Here, the defendant pled guilty to a B felony and was sentenced to fifteen years. Tenn. Code Ann. § 39-17-1307(b)(2). Therefore, he was not eligible for probation. *See Id.* § 40-35-303(a) (“A defendant shall be eligible for probation under this chapter if the sentence actually imposed upon the defendant is ten (10) years or less[.]”). Moreover, the defendant was not eligible for community corrections under subsection (a) because his offense involved “the use or possession of a weapon” or subsection (c) because he was not eligible for probation. *See Id.* § 40-36-106(a)(1)(D); *State v. Kendrick*, 10 S.W.3d 650, 655 (Tenn. Crim. App. 1999) (citing *Staten*, 787 S.W.2d at 936). Because the defendant was ineligible for either probation or community corrections, the trial court did not abuse its discretion in denying an alternative sentence. Accordingly, the defendant is not entitled to relief on this issue.

II. Mitigating Factors

The defendant argues the trial court erred in failing to apply two mitigating factors. The defendant contends the trial court should have considered the defendant’s use of self-defense when using the gun at issue in the case as well as “the extreme racial disparity in felon-in-possession prosecutions.” The State did not address this issue in its appellate brief.

When discussing mitigating factors, the trial court noted

[b]ecause this is referring only to the possession of a gun, the mitigating factors are really not something – neither caused nor threatened serious bodily injury. Because we know there was serious bodily injury. He had the gun. But that’s kind of hard to kind of – He didn’t have a minor role; because of age lacked substantial judgment. None of that kind of really applies on this. And any other factor consistent with the purpose of the chapter would be only that he entered a plea.

Although the defendant requested mitigating factor (3) as well as mitigating factor (13) based on the extreme racial disparity of felon-in-possession prosecutions, the defendant’s cooperation with the State, and the death of the defendant’s sister while the defendant was in custody, the trial court did not articulate findings on the record to explain

why factors (3) and (13), apart from the defendant's cooperation with the State, were inapplicable. While the trial court should have made more findings regarding its denial of these mitigating factors, any errors were harmless in light of the existing enhancement factors, particularly that the defendant was on probation at the time the offense was committed and that the defendant had a history of criminal behavior in addition to the felonies used to establish his sentencing range.

Furthermore, the "misapplication of an enhancement factor or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act." *Bise*, 380 S.W.3d at 706. Our review of the record indicates the trial court imposed an applicable within-range sentence after properly considering the evidence adduced at the guilty plea and sentencing hearings, the presentence report, the principles of sentencing, the parties' arguments, the nature and characteristics of the crime, the potential for rehabilitation, and the evidence of enhancement and mitigating factors. Tenn. Code Ann. §§ 40-35-103(5), -114, -210(b). The defendant is not entitled to relief on this issue.

III. Consecutive Sentences

The defendant contends the trial court erred in imposing consecutive sentences. Specifically, the defendant argues the trial court failed to make any findings regarding its imposition of consecutive sentencing. The State submits the trial court acted within its discretion by imposing a consecutive sentence.

In *State v. Pollard*, 432 S.W.3d 851 (Tenn. 2013), the Tennessee Supreme Court expanded its holding in *Bise* to also apply to decisions by trial courts regarding consecutive sentencing. *Id.* at 859. This Court must give "deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)." *Id.* at 861. "Any one of [the] grounds [listed in section 40-35-115(b)] is a sufficient basis for the imposition of consecutive sentences." *Id.* at 862 (citing *State v. Dickson*, 413 S.W.3d 735 (Tenn. 2013)).

In imposing consecutive sentences, the trial court stated, "And it is also going to be consecutive to his other case." While the trial court did not explicitly state why it was imposing consecutive sentences, Tennessee Code Annotated section 40-35-115(b)(6) provides that a trial court may order consecutive sentencing by finding that "the defendant is sentenced for an offense committed while on probation." As noted by the trial court during its sentencing discussion, the defendant was on probation in Davidson County Case No. 2016-I-990 at the time the instant offense was committed. Accordingly, we conclude the defendant's probation status alone justifies the imposition of consecutive sentencing.

The trial court did not abuse its discretion by imposing consecutive sentences, and the defendant is not entitled to relief on this issue.

Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed.

J. ROSS DYER, JUDGE